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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

AUSTIN MILLER STATLER, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. 479

PETITION FOR REHEARING

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vs.		No. 479
UNITED STATES OF AMERICA, Respondent.		

PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes the petitioner, Austin Miller Statler, Jr., and respectfully petitions the Court for a rehearing of his petition for certiorari, denied by this Court on February 2, 1948, and upon the following grounds, to-wit:

I.

This Court apparently overlooked the point of controlling importance in determining whether the joint trial of petitioner, resulting in the reading of a statement made by his co-defendant, Matthews, was a violation of rights guaranteed petitioner by the 5th and 6th Amendments to the Federal Constitution. This point was the coopera-

tion between Matthews and Government counsel under which his statement could be read to the jury under circumstances that precluded petitioner either from cross-examining Matthews or showing his previous conviction of infamous crimes. Matthews' statement, set out in full in the appendix to the petition for certiorari, was read in evidence over the objection and exception of petitioner (R. 392). That statement contained little or nothing which incriminated Matthews, and insofar as it was material to any issue at the trial, its incriminating matters were largely restricted to petitioner. From beginning to end, it was the equivalent of a deposition that Statler was primarily responsible for the crime charged in the indictment (R. 393, 397). No cautionary instructions could possibly have removed from the minds of the jurors the prejudice to petitioner resulting from the reading of this statement.[1]

However, it is not the futility of cautionary instructions but the failure of the Government to disclose the relationship of Matthews to the prosecution that presents the most cogent reason for a review of the case by this Court. Matthews' statement was taken by an FBI agent in the office of Matthews' attorney, and the agent came there at the request of the attorney (R. 397). Matthews' associates in certain criminal enterprises had plead guilty and testified as witnesses for the Government at the trial. Matthews had testified as a witness for the Government before the grand jury but did not testify at the trial. His defense was purely formal. His association in criminal enterprises with Neal and other witnesses for the Gov-

[1] Hale v. U. S., 8th Cir., 25 F. 2d 430, 438, 439; United States v. Haupt, 7th Cir., 136 F. 2nd 661, 673, 674; People v. Feolo, 282 N.Y. 276, 26 N.E. 2d 256, 258, 259; Flamme v. State, 171 Wis., 501, 177 N.W. 296, 298; People v. Sweetin, 325 Ill. 245, 156 N.E. 354, 357.

ernment, his testimony as a Government witness before the grand jury, the contents of his statement to the FBI agent, given in the office and in the presence of his attorney, and his previous criminal record, including two convictions for highway robbery (R. 568, 571), were known in advance of the trial to the Assistant United States Attorney who prosecuted the case (R. 527, 530; 568-571) but were not disclosed to the Court when the motion for a severance was made (R. 21-23).

When Matthews' statement was read to the jury, there had been no denial of the incriminating testimony against him and there was no reason to believe that he would testify in his own defense or refuse to testify as a Government witness if so requested by the United States Attorney. Therefore, the purpose to prejudice the jury against petitioner through the reading of this statement is the only explanation of its introduction in evidence, and the Government should not now be heard to say that the reading thereof did not have the intended effect.[2] Cautionary instruction should not be a cloak for such an invasion of fundamental rules of fairness.

There is another circumstance relating to Matthews which was inadvertently overlooked in the preparation of the petition for certiorari. He did not prosecute his appeal from the judgment of conviction, and thereafter was employed by the Government (R. 582, 583, 584). The extent of the cooperation between Government agents and Matthews and his attorney, the fact that there was no necessity for introducing the statement under discussion as against Matthews, and the highly prejudicial char-

[2] Coulson v. U.S., 10th Cir., 51 F. 2d 178, 182; Pierce v. U.S., 86 F. 2d 949, 953; Little v. U.S., 8th Cir., 93 F. 2nd 401, 408.

acter thereof as it related to petitioner are clearly sufficient to bring this case within the scope of the principle applied by this Court in Mooney v. Holohan, 294 U.S. 103 and Berger v. U. S.; 295 U.S. 78, which protects the accused against unfair acts on the part of public prosecutors.

Any possibility that the jury could perform the "mental gymnastics" (54 F. 2d 1007) necessary in following the Court's instruction to disregard this statement as against petitioner was removed by the assertion in the Court's charge that Matthews' statement "*corroborated certainly to some extent the statements of Sparks and Neal.*" (R. 514, 515). In a footnote, at page 6 of the brief for the United States in opposition to the petition for certiorari, it is said that the Court's statement under consideration was made in the course of his review of the evidence concerning Matthews. But that is entirely immaterial. Any individual who could consider this statement as positive corroboration of the testimony of two witnesses as it affected one party and as entirely negative as it affected another party involved in the same transaction would be a genius, not an ordinary juror.

This is not the case of a joint trial of two defendants, each making a bona fide defense, but the trial of petitioner with a nominal codefendant who was to all intents and purposes a Government witness who testified far more effectively against petitioner through his statement than he could have done as a witness subject to cross examination and to impeachmnet by the record of his prior convictions.

Considering substance, not form, we think it clear that the reading of this statement to the jury violated the con-

frontation clause of the Sixth Amendment to the Federal Constitution. Motes v. U. S., 178 U.S. 458; Kirby v. U. S., 174 U.S. 47, 59.

In the Kirby case, involving an indictment for receiving stolen property, it was held that the judgment of conviction against the principal felon could not be received in evidence on the trial of the person charged with receiving the stolen property. The court held that the introduction of this record in evidence was a violation of the Sixth Amendment, which provides that in "all criminal prosecutions the accused shall . . . be confronted with the witnesses against him." One of the grounds on which the court predicated this conclusion was the fact that the alleged receiver of the stolen porperty, if present at the trial of the party convicted for stealing it, would not have been permitted to examine the thieves "upon their pleas of guilty, nor cross-examine witnesses in that case." (See page 53 of the opinion.)

In the brief of the United States in opposition to the petition (p. 6), reference is made to the case of Blumenthal, et al, v. U. S., decided by this Court December 22, 1947, as sustaining its contention that the cautionary instructions of the Court in the instant case were sufficient to protect petitioner from any prejudice arising from the reading of the Matthews' statement. An entirely different situation, however, is presented by the record in that case and the record in the instant case. In the Blumenthal case, all the defendants were making a real defense and there was a substantial reason for introducing the statement against the party that made it. Such is not the situation here where one of the defendants had testified as a Government witness before the grand jury and after the trial was employed by the Government. (R. 584).

II.

At page 9 of the brief of the United States, opposing the petition for certiorari, it is insisted that the testimony of the so-called accomplices was not "totally uncorroborated". Such insistence is without merit. It is true, as there asserted, that petitioner owned a light gray 1940 Dodge coupe and that one Pearson, referred to as an "independent witness", so testified, but it is an abuse of language to call this employee of Neal an "independent witness". Petitioner owned a 1940 Dodge coupe, and the accomplices so testified, but this is not a "material fact" which tends to prove that the accused was connected with the crime charged, and, it is not, therefore, a corroborating fact or circumstance. (Wharton's Criminal Evidence, 10th Ed., sec. 442.)

Regardless of whether Pearson is considered an "independent" or a controlled witness, the testimony of Pearson with respect to the color and model of petitioner's car is one of the matters that is destructive of the probative value of his testimony. He claimed to have made his observation through a small window in the side of the liquor store where he worked for Neal and in the nighttime while the lights on the car were extinguished and there was no light on the premises except a small electric light on the front of the store and to have made this observation while busy waiting on customers inside the store (R. 372, 373).

If further evidence is needed to show that Pearson was not testifying to facts within his own knowledge but merely repeating what he was told to say, it will be found in his testimony that petitioner and Matthews brought a load of whisky to Marks, Mississippi, on the occasion he

claims they were there (R. 365). On cross examination he admitted that he did not see any whisky in their car or see either of them with whisky but predicated his conclusion on the fact that later in the night he discovered some whisky in his bedroom, at the rear of the store, which he did not see placed there or know how it got there (R. 370). Such testimony is intrinsically destitute of probative value in either a trial or an appellate court. [3]

It was the contention of the Government at the trial and in the Circuit Court of Appeals that the record discloses no motive why Neal and Sparks should have implicated petitioner unless he had been a guilty participant in the crime to which they confessed. "Proof of motive is never indispensable to conviction" (Pointer v. United States, 151 U. S. 376, 414), and there is no sound reason why a defendant should be required to prove a motive in order to destroy the probative value of the testimony of two thoroughly discredited accomplices, one of whom admitted that he had perjured himself in prior proceedings in the cause (R. 318).

However, the record suggests a motive for the implication of petitioner by Neal and Sparks, the latter an employee and associate of Neal in criminal enterprises. This motive was the shielding of some confederate at the Fisher plant. It appears without dispute in the record that Neal planned the procedure for handling the checks and controlled the disposition of the proceeds, in which it is admitted that petitoner did not share (R. 300, 345). Neal informed relatives of Sparks, who deposited the checks in Alabama banks, that he had a relative at the

[3] Edison Co v. National Labor Relations Board, 305 U.S. 197; Quock Ting v. United States, 140 U.S. 417.

Fisher plant and had gotten the checks from him (R. 164, 254). Neal did have a relative working there (R. 206, 207). It is inconceivable that he would have made this statement if he had obtained the checks from petitioner, whom he had no reason to shield at the time the statement was made to relatives of Sparks in Alabama.

Upon the considerations aforesaid and others appearing in the petition for certiorari and the record, petitioner respectfully prays that this Court re-consider the petition for certiorari and, upon such re-consideration, he prays that the petition for certiorari be granted as prayed in the petition, and petitioner prays for such other and further relief in the premises as to this Court may seem right and proper.

L. E. GWINN,
Counsel for Petitioner.

I, the undersigned attorney for petitioner, do hereby certify that the foregoing petition is presented in good faith and not for delay. I further certify that the petition for rehearing is restricted to the grounds specified in Rule 33, as amended, the first three paragraphs thereof relating to a point apparently overlooked in the consideration of the petition for certiorari, and being necessary to show the distinction between Blumenthal v. United States, decided by the Supreme Court December 22, 1947, relied on by the Government in its brief opposing certiorari, and not available to petitioner when the original petition was prepared, and the instant case.